IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO. 904 OF 2004

IN

SUM. SUIT NO. 239 OF 2000

Albaraka Finance House
Ltd., .. Plaintiff.

vs.

Santosh Kejriwal .. Defendant.

Ms. Alpana Ghone a/w Sheebo Ajwan i/by Dave Girish & Co. for plaintiff.

Mr. Anand Kumar for defendant.

CORAM : S.U. KAMDAR, J.

DATE : 4th October, 2005.

P.C.:

. The present suit is filed for recovery of lease rental due and payable for the leasehold machinery of the lessee company namely, Orient Syntex Limited. The lease agreement has been executed on 27.9.1995 by and between the plaintiff and the said company. The defendant has given a guarantee and executed a deed of guarantee dated 7.12.1995 guaranteeing the payment of the amount of

the lease rental from time to time. The guarantee provides for payment of the lease rental to the extent of Rs. 1 crore. The suit has been filed for invoking the said guarantee since there were defaults in payment of the lease rentals by the original lessee i.e. Orient Syntex Limited. It is the case of the plaintiff that the lease was paid upto April 1997 and thereafter there were defaults. The suit has been filed on 31.12.1999 in this Court. The said company Orient Syntex Limited was under BIFR. It is the case of the defendant that in view of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 the proceedings could not have been initiated against the guarantor unless a permission is obtained from the BIFR as contemplated under section 22 of the said Act. It has been contended that in view of the fact that the suit is filed without the leave of the BIFR. The suit is void ab initio and nonest and no relief can be granted in such a suit. In support of the aforesaid contention, the learned counsel has relied upon the judgment of the learned Single Judge of this Court in the case of Sanjay Gorging and Steel Industries v. Bombay Forgings Pvt. Ltd., reported in 1995 Company Cases Vol. 82 page 586. He has also relied upon the judgment of the learned Single Judge of this Court in the case of C.J. Gelatine Products Ltd., In re. reported in 1994 Company Cases Vol. 81, page 890. He has also relied upon

the judgment of the Division Bench of the Gujarat High Court in the case of Testeels Ltd., vs. Radhaben Ranchhodlal Charitable Trust, reported in 1989 Company Cases, Vol. 66, page 555. He has also relied upon the judgment of the Apex Court in the case of Gram Panchayat and another vs. Shree Vallabh Glass Works Ltd., & Others, reported in 1991 Company Cases, Vol. 71, page 169. He has also relied upon the judgement of the learned Single Judge of this Court in the case of Industrial Credit and Investment Corporation of India Ltd., vs. Dhanesh D. Ruparalia & anr. reported in 1999 (4) LJ 761. In my opinion, all the aforesaid judgments relied upon by the defendants have no relevance to the facts of the present case. In each of the aforesaid judgment when the suit was taken up for consideration the protection under section 22 of SICA was in force and the question was that whether in view of the provisions of section 22 the proceedings should be stayed and/or should be dismissed because of non-obtaining of the prior permission. It is an admitted position in the present case that the proceedings under section 22 has already come to an end. In that view of the matter as on today there is no bar under section 22 from considering the suit. The contention that merely because it was lodged at the time when the provisions of section 22 were applicable then even after the conclusion of the proceedings of the BIFR

the suit should be dismissed in my opinion is not correct position in law. The correct position of law in my opinion is that once the provisions of section 22 ceases to be in operation then this Court acquires the jurisdiction to entertain and try the suit irrespective of the fact that whether at the time of filing of the suit the provisions of Section 22 was applicable. In any view of the matter, in the present matter the earlier summons for judgment had come up for consideration, the matter was heard and the summons for judgment was withdrawn with liberty to take out fresh summons for judgement by order dated 1.7.2002. In that view of the matter, I am of the opinion that the contention of the learned counsel that the present suit cannot proceed merely because it was filed during the period when section 22 was in operation cannot be accepted. The aforesaid plea is, therefore, rejected.

2. The next contention is that though the plaint is amended and the amount is reduced, in the summons for judgment which has been taken out the amount claim is an original amount and not reduced. The learned counsel for the plaintiff restricts the claim in the summons for judgment to the claim as amended to Rs. 60,02,750/- the said statement of the learned counsel for the plaintiff is accepted. In that view of the matter, the defence of the discrepancy in the amount also does not survive.

3. The third and the last contention raised is that the guarantee is not in respect of the lease rental and it has no connection between the lease agreement executed by the company. The recital in the guarantee dated 7.12.1995 makes it clear that the said guarantee is executed for lease rental in respect of the lease facility extended to M/s. Orient Syntex Limited. Thus, the aforesaid contention also has no merit. I accordingly reject the same. The learned counsel for the defendant has thereafter contended that the amount which is due and payable is not computed by indicating what is the amount due and payable by the company. In my opinion, that contention has also no basis whatsoever as the claim under the guarantee is claim co-existent with the claim of the principal debtor. The learned counsel for the defendant is unable to show that any payments are made by the company which was a principal debtor and thus, the claim raised by the plaintiff in the suit is not the accurate claim. In that view of the matter, the question of accepting the contention of the defendant does not arise. Lastly, the learned counsel for the defendant has relied upon the judgment of the Apex Court in the case of Asea Brown Boveri Ltd., vs. Industrial Finance Corporation of India & Ors., reported in 2005 (5) ALL MR (S.C.) 129 in which the Supreme court has held that the lease transaction is

nothing but in the nature of a finance arrangement. It is undoubtedly true that the lease rental is claimed in the present case as finance arrangement arrived at between the parties. In fact the guarantee which is entered into between the parties in the present case itself says that there was a lease finance arrangement with the original company. In that view of the matter, even if it is the finance arrangement, the liability to pay by the defendant as guarantor does not cease to exist. However, with a view to give an opportunity to the defendant to defend the suit, I direct the defendant to deposit a sum of Rs. 60 lacs in this Court within a period of four weeks from today. The amount if so deposited, the Prothonotary and Senior Master is directed to deposit the same in a fixed deposit with any nationalised bank initially for a period of one year and renew the same from time to time till further orders from this Court.

4. Suit transferred to the list of Commercial Causes. Written Statement or points of defence to be filed four weeks from the date of deposit. Affidavits list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on Board of the learned Judge taking Commercial Causes.